Supreme Court, U.S.
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CASE NO.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM

Bertha Lee Footman and
Beresford Robinson,
Individually and as
Co-Personal Representatives
of the Estate of Charlene
I. Robinson, deceased,

Petitioners,

vs.

United States of America,
National Aeronautics and Space
Administration,

Respondents.
_____/

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. When an unfunded instrumentality of the United States exercises its discretion to create, staff, and operate a swim facility, the government has a duty to use reasonable care to safeguard paying guests. When a small child drowns at that facility, in part because of the use of unqualified "lifeguards" and other negligent management of the facility, the lower courts' refusal to allow an action against the government based on the discretionary function exception to the Federal Tort Claims Act constitutes a departure from the accepted and usual force of judicial proceedings in direct conflict with authority flowing from this court's decision in Indian Towing Company v. United States of America, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), and with decisions of other United States Courts of Appeals.

II. When the government's uncontradicted evidence establishes that a low-level employee of an unfunded instrumentality of the United States is without discretion in matters affecting the social, economic, or political policy of the United States government in the management of a swimming facility in decisions involving the hiring of personnel and the day-to-day management of the facility, and the lower courts determined him to have possessed and exercised such discretion, then the lower courts departed from, or sanctioned the departure from, the accepted and usual force of judicial proceedings in conflict with this court's decisions in United States v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed. 2d 335 (1991), Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953); United States v. Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed. 2d 660 (1984); and, Berkovitz v. United States, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed. 2d 531 (1988).

LIST OF PARTIES

Bertha Lee Footman

Tammy Footman

Beresford Robinson

Estate of Charlene I. Robinson, deceased

United States of America, National Aeronautics and Space Administration

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REPORTS OF OPINIONS DELIVERED IN THE CASE

United States District Court for the Middle District of Florida: Case No. 92-0474-CIV-ORL-18. United States Court of Appeals for the Eleventh Circuit: Docket No. 93-3317.

STATEMENT OF GROUNDS FOR JURISDICTION

The United States District Court for the Middle District of Florida entered its Order in this cause on September 28, 1993, dismissing Petitioners' claims against the United States for lack of subject matter jurisdiction, on the ground that the United States' allegedly negligent acts fell within the discretionary function exception to the Federal Tort Claims Act's waiver of sovereign immunity. On September 20, 1994, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's Order per curiam. No rehearing was sought.

Jurisdiction is conferred on this Court to hear this cause by Writ of Certiorari by 28 U.S.C.A. §1254.

STATUTES INVOLVED IN THIS CASE

28 U.S.C.A. §1346(b)

28 U.S.C.A. §2671

28 U.S.C.A. §2674

28 U.S.C.A. §2680(a)

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS

Petitioners, Bertha Lee Footman and Beresford Robinson, were the Plaintiffs in the U.S. District Court as the duly qualified Co-Personal Representatives of the Estate of Charlene I. Robinson, deceased [R4-78-9, IX(H)]. They presented a claim arising from the death of their daughter, Charlene Robinson, by drowning at KARS Park on Kennedy Space Center, Merritt Island, Florida on June 9, 1990 [R4-78-9, IXB]. The United States made no response [R4-78-9, IX(C)].

An amended complaint alleged the United States was responsible for the drowning of Charlene I. Robinson by virtue of the failure of its employees: (1) to hire certified lifeguards; (2) to provide lifeguards with in-house and recurrent training to develop life-saving skills; (3) to provide lifeguards with a means to obtain emergency and immediate backup response from EMS; (4) to develop a fail-safe system to keep unsupervised children from using the government's swim lake facility; (5) to identify the drowning victim and to respond to a potential emergency; (6) to immediately initiate CPR on the decedent and to use industry-defined CPR procedure; and, (7) to take recommended preventative measures in the face of previous drownings [R4-64-3, 4].

The United States claimed lack of subject matter jurisdiction over the action relying on the discretionary function exception to the Federal Tort Claims Act [28 U.S.C.A., §§1346(b), 2671, et seq. hereinafter referred to as the "FTCA"][R4-75-3, 4].

The United States District Court determined the discretionary function exception applied to the actions complained of; that sovereign immunity barred Plaintiffs' claims against the United States; and, dismissed Plaintiffs' claims against the United States for lack of subject matter jurisdiction [R5-93-1, 2]. The United States Circuit Court of Appeals, Eleventh Circuit, affirmed per curiam.

STATEMENT OF THE FACTS

On June 9, 1990, Charlene Robinson, a 7-year old female, was attending a picnic at KARS Park with her family, and drowned in the swim lake on the Park premises [R4-78-9, IX(E)]. She was a paying guest at the facility [R4-67-7, RS-52-32, Ex. 3][1].

The Park where Charlene Robinson died is on property of the United States occupied by the National Aeronautics and Space Administration [hereinafter "NASA"] at the Kennedy Space Center in Brevard, County, Florida [R4-78-10, IX(K)].

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[1] The record designation "RS", refers to those portions of the record designated on the district court's civil docket, as being located in separate exhibit folders between the end of volume 2 and the beginning of volume 3 (pages 6-7 of the docket sheet).

The Park is operated by the NASA Exchange-KSC [hereinafter "the Exchange"], through its instrumentality, the Kennedy Athletic Recreation and Social Organization [hereinafter, "KARS"][R4-78-10, IX(L)]. The Exchange is a non-appropriated fund instrumentality of the United States of America [R4-78-10, IX(I), RS-51-45, Ex. 3]. The KARS organization is an element of the Exchange [R4-78-10, IX(J)]. The Exchange staffed the swim lake facility at KARS Park with lifeguards paid by the Exchange [R4-78-10, IX(M)]. Mitchell G. Tidwell, the Park Manager, and the lifeguards on duty at KARS Park were "employees of the government" within the provisions of 28 U.S.C.A., Section 2671 [R4-78-10, IX(N)].

The Exchange is mandated by management instructions to operate in the most efficient manner for the benefit of all NASA employees [RS-51-28, Ex. 2, attachment A-1, paragraph 1, attachment A-2, paragraph 2.b(3)]. No paid employee of the Exchange may be a member of the Exchange Council, the organization's policy-making body [RS-51-28, Ex. 2, attachment A-2, paragraph 2.b(4)]. The Council consists exclusively of NASA employees [RS-47-17].

KARS is an element of the Exchange promoting the morale and welfare of NASA employees of the Center [RS-51-28, Ex. 2, attachment B-1]. KARS is responsible for the development

and utilization of KARS Park Number 1 [RS-51-28, Ex. 2] [hereinafter, "the Park"].

Mitchell G. Tidwell was employed by the Exchange as Park Manager February 13, 1973 [RS-47-4]. When he was hired, the Exchange was looking for someone "handy" with woodworking and small electrical repairs [RS-47-12]. Tidwell's immediate supervision in June, 1990, was the KARS facilities' Director [RS-47-16], who reported directly to the Chair of the Exchange Council [RS-47-19].

The Park contains a swim lake, circular in shape and approximately 180 feet in diameter, fed from two artesian wells. The water is filtered and chlorinated. Photographs [RS-49-29, Ex. 2, p.p. H-1 to H-8] reveal the lake to be surrounded by a chain link fence approximately four feet in height with one entrance guarded by a gate which can be locked [RS-49-29, Ex. 2, p. H-5].

The operation of this swim lake by the Exchange and KARS goes back to the 1960's. A drowning occurred at the lake on May 17, 1970 [RS-48-9, Ex. 1]. On May 28, 1979, there was a second drowning at the swim lake [RS-48-9, Ex. 1, attachment 25].

Testimony concerning the involvement of the Exchange in personnel hiring decisions at the Park was conflicting. The Council Chairman [RS-54-9], testifying on behalf of the United

States [RS-54, Ex. 1], stated the Exchange Council never got involved in personnel hiring decisions at KARS Park [RS-54-23]. The President of KARS [RS-52-7], also designated to testify by the United States [RS-52, Ex. 1], stated that the Council made all the final determinations on staffing decisions [RS-52-14]. Tidwell managed the day-to-day operations at the Park [RS-52-12, 14].

The Chairman was the person who determined all policy questions and issues [RS-54-15]. The Exchange Council doesn't direct KARS in its day-to-day activities, it issues broad policy guidelines [RS-54-20]. The Operations Manager for the Exchange Council [RS-53-7], testifying for the United States [RS-53, Ex. 1], confirmed there is no direct supervision of KARS' activities by the Exchange Council [RS-53-10].

But the Exchange does exercise control over the operation of the swim lake. The Exchange, not Tidwell, sets the Park's budget [RS-53-12, 20, 21, 22, Exs. 2, 5, 6, 7]. Tidwell is not even allowed to manage the revenues generated by Park activities, but must turn them over to the Exchange [RS-47-24]. The Director of facilities [RS-51-49], designated to testify on behalf of the United States [RS-51, Ex. 1], confirmed the decision by the Council (not Tidwell) to pay lifeguards at the swim lake enough to be competitive with other places that employed lifeguards [RS-51-49, Ex. 4; RS-53-22, Ex. 6]. In a

May, 1988 Exchange Council meeting, the Director of Facilities was instructed by the Council to instruct lifeguards regarding attentiveness on the job [RS-51-50].

The Council also considered problems with people leaving children unattended in the pool with unauthorized flotation equipment [RS-51-56]; and emptying the pool of people and locking the gate into the enclosure while lifeguards took breaks [RS-51-57]. The Council also approved the installation of a water slide at the swim lake [RS-53-21, Ex. 5].

The subject of safety was one of paramount importance to the Exchange..."safety is the -- one of the highest items at KSC" [RS-51-114]. If the Exchange thought there was something unsafe about a facility, they would do something about it [RS-51-115].

On the subject of discretion, the United States testified as follows:

> Q. Is there anything discretionary about employing the highest standards of safety on KARS' facilities?
>
> A. No, I would not think so [emphasis supplied, RS-51-115].

The facilities Director testified he did not have the discretion to tolerate a condition at the Park that was life-threatening or potentially life-threatening [RS-51-127].

In June, 1990, the Exchange employed five lifeguards under Tidwell's supervision to provide protection for bathers using the

Park's swim lake [RS-47-81, 85]. The head lifeguard had worked as a lifeguard at the Park the previous year [RS-46-5]. He got his orders from Tidwell [RS-46-21]. In June, 1990, he was 17 years of age [RS-46-5]. The other four lifeguards were all hired in 1990 [RS-47-85, 86]. Tidwell did not even interview the new hires [RS-47-86].

The head lifeguard was allowed by Tidwell to "basically hire" the other lifeguards [RS-46-17]. Tidwell let him run that operation and did not exercise much control over him [RS-47-88]. Of the lifeguards on duty on June 9, 1990, four of the five had no lifeguard training at all [RS-46-6; RS-38-8; RS-37-15, 20; RS-39-9]. None had certificates [RS-40-9]. None of the lifeguards had current CPR certificates [RS-46-10; RS-40-13; RS-38-8; RS-39-11; RS-37-17]. Two of them had failed the CPR courses taken in high school [RS-37-17; RS-39-11].

The access to the swim lake was controlled by the chain link fence and the one gate [RS-49-29, Ex. 2, p. H-5]. On June 9, 1990, there were rules for use of the swim lake posted at the gate by the government. Tidwell did not post these rules. This was done by NASA Safety [RS-47-53]. Tidwell:

> ...I didn't like the rules. But I didn't have any say-so. You work for NASA, you don't have any say-so [RS-47-54].

ARGUMENT

I. When an unfunded instrumentality of the United States exercises its discretion to create, staff, and operate a swim facility, the government has a duty to use reasonable care to safeguard paying guests. When a small child drowns at that facility, in part because of the use of unqualified "lifeguards" and other negligent management of the facility, the lower courts' refusal to allow an action against the government based on the discretionary function exception to the Federal Tort Claims Act constitutes a departure from the accepted and usual force of judicial proceedings in direct conflict with authority flowing from this court's decision in Indian Towing Company v. United States of America, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), and with decisions of other United States Courts of Appeals.

The District Court, affirmed by the Circuit Court of Appeals, determined that, having made the discretionary determination to build, operate and staff a swimming facility on public property, the government did not owe the patrons of that facility any duty of reasonable care in the day-to-day operation of the facility because those day-to-day decisions somehow involved implementation of social, economic or political policies of the United States. This decision was a departure from the accepted and usual force of judicial proceedings, because it directly conflicts with the principle established by this Court in Indian Towing Company vs. United States of America, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), that, where government voluntarily assumes a function not mandated by statute or regulation, it has an absolute duty to perform that function with reasonable care. In addition, the lower courts'

decision conflicts with the decisions of other circuit courts of appeals in very similar factual settings. The lower courts' departure from this Court's precedent and the conflicts engendered with other courts of appeals, require that the writ be issued and that this matter be accepted for full review.

In its decision in Indian Towing, this Court found liability for the negligent performance of a duty voluntarily assumed by the United States. There, claim was made against the government for the Coast Guard's negligent failure to service, maintain and repair a navigation beacon which malfunctioned, causing injury [350 U.S. 62]. The government conceded at the outset that the provisions of 28 U.S.C.A. §2680(a) were not involved in this fact situation and this Court noted, "hornbook tort law" that one who undertakes to warn the public of danger, inducing reliance, must perform that "good samaritan" task in a careful manner [350 U.S. 64-65]. Liability was found under this rationale:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light...and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act [350 U.S. 69].

In the present case, Petitioners have maintained before both lower courts that these ideals apply specifically to the circumstances surrounding their young daughter's death. There, the government exercised its discretion to create, operate and staff the swim lake facility with lifeguards. The government engendered reliance on the part of the public by limiting access to the facility, posting rules, and providing persons designated as "lifeguards" who were totally unqualified to perform that task. Having engendered that reliance, the government utterly failed to exercise the reasonable care which would have avoided this unnecessary death.

The government, through its instrumentality, was never required to create and operate this facility, but once that discretionary decision was taken, it was obligated to use due care to provide competent management and competent lifeguards, and even to discover the fact of its park manager's poor management of the facility. Those failures made the United States liable to Petitioners under the FTCA pursuant to the rationale in Indian Towing. The lower courts' disregard for the clear precedent of this court applied to this case mandates that this Court exercise its power of supervision.

Special and important reasons beyond the academic or the episodic require this Court's review. Ricer v. Sioux City Memorial Park Cemetery, Inc., 75 S.Ct. 614, 349 U.S. 70, 99

L.Ed. 897 (1955). The implications of this decision are much broader than the uncompensated personal tragedy which will occur if review is denied.

Any time a government agency voluntarily assumes responsibility for conducting an activity and performs that function negligently, causing injury, the government will seek to escape liability by application of the discretionary function exception to the day-to-day actions of employees of the government. This will result in an increased burden on the United States District Courts, and enormous expense to the individual litigants and to the government throughout the system.[2] Reasserting the holding in Indian Towing will avert those evils for other, similarly situated litigants; will restore uniformity in consideration of these questions in all Circuits; and, effect justice for these Petitioners.

As indicated above, the decisions of the lower courts conflict with decisions of other circuits concerning the exercise of discretion by the United States to voluntarily engage in a non-mandated activity. The "good samaritan" rule established by this Court in Indian Towing has been followed by several circuits in circumstances substantially similar to the facts in this

[2] For instance, the Petitioners here have incurred expenses of more than $45,000.00 preparing this case for trial before the Court's decision on the eve of trial. The government listed taxable costs of $8,562.50, but Petitioners would estimate the government's actual costs equalled or exceeded Petitioners'.

case: Ingham v. Eastern Airlines, Inc., 373 F.2d 277 (2nd Cir. 1967), cert. den. United States v. Ingham, 88 S.Ct. 295, 389 U.S. 931, 19 L.Ed. 2d 292 (1967); Caraballo v. United States, 830 F.2d 19 (2nd Cir. 1987); Seaboard Coastline Railroad Company v. United States, 473 F.2d 714 (5th Cir. 1973); Rise v. United States, 630 F.2d 1068 (5th Cir. 1981); Ross v. United States, 640 F.2d 511 (5th Cir. 1981); Butler v. United States, 726 F.2d 1057 (5th Cir. 1984); Wiggins v. United States, 799 F.2d 962 (5th Cir. 1986); Denham v. United States, 834 F.2d 518 (5th Cir. 1987); Mandel v. United States, 793 F.2d 964 (8th Cir. 1986); Huber v. United States, 838 F.2d 398 (9th Cir. 1988).

In all of these cases, the government voluntarily assumed a non-mandated duty and performed it negligently, as did the government in Indian Towing, and in this case. The Court in Denham stated the rationale more succinctly than even this Court, in considering a similar claim of immunity in a swimming facility accident:

> We do not believe that Congress intended one who was injured because of a danger negligently created by the (government) within a designated swimming area to have no legal remedy [834 F.2d 521].

To allow the lower courts in this case to preclude recovery to Petitioners because of negligence occurring years after the discretionary decision was taken to build and operate the

swimming facility, when that negligent operation caused Charlene Robinson's death, conflicts with all of these decisions from the other circuits holding, as did this Court in Indian Towing, that, once the discretionary decision to act is made, a duty arises to carry out that decision with the exercise of reasonable care. Review must be granted to harmonize the lower courts' decisions with the decisions of this Court and those of the other circuits on this question. Braxton v. United States, 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed. 2d 385 (1991).

II. When the government's uncontradicted evidence establishes that a low-level employee of an unfunded instrumentality of the United States is without discretion in matters affecting the social, economic, or political policy of the United States government in the management of a swimming facility in decisions involving the hiring of personnel and the day-to-day management of the facility, and the lower courts determined him to have possessed and exercised such discretion, then the lower courts departed from, or sanctioned the departure from, the accepted and usual force of judicial proceedings in conflict with this court's decisions in United States v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267, 113 L.ed. 2d 335 (1991), Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed 1427 (1953); United States v. Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed. 2d 660 (1984); and, Berkovitz v. United States, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed. 2d 531 (1988).

In determining that a low-level employee of an unfunded instrumentality of the United States was exercising discretion affecting the social, economic or political policies of the United States, the lower courts ignored the government's uncontroverted documentary evidence and oral testimony that the employee in question did not possess that kind of discretion. The founding document of the organization employing the decision-maker specifically excluded the organization's employees from serving on the policy-making body. The District Court's analysis never acknowledged this uncontradicted evidence, and never came to grips with the internal inconsistency which this evidence created in its reasoning.

For purposes of this proceeding, these Petitioners concede that no mandatory regulations deprived the government

employee of discretion. However, Petitioners show that the level at which the employee operated and the type of decisions involved were not such as were intended by Congress to be protected under the discretionary function exception. The lower courts' application of that exception on these uncontroverted facts departed from the accepted and usual force of judicial proceedings and was in conflict with this Court's opinion in United States v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed 2d 335 (1991).

As set forth in Gaubert, absent a claim that mandatory laws or regulations deprive the actor of discretion, analysis requires determining whether the discretion was exercised in furtherance of public policy goals [111 S.Ct. 1275]. In this case, the level of the employee involved is so low that he is only an "employee of the government" by courtesy of statutory definition. He is specifically excluded from serving on his employer's policy-making body by its founding charter. He is not allowed to set the budget for his park; nor even to manage receipts derived from users of the park.

In short, he is an employee who is only concerned with day-to-day management; not pondering the social, economic or political implications of his decisions. In this case, the lower courts are taking the position that persons who are not even receiving compensation from the United States Treasury are

making policy decisions affecting the health and welfare of this country's citizens. This is an unparalled departure from this Court's previous holdings on this subject. Petitioners' have been unable to find any other instance where the employee of an unfunded instrumentality was deemed to be exercising such discretion.

In his concurring opinion in this Court's decision in Gaubert, Justice Scalia described Maurice Tidwell as one of those government employees whose discretionary decision would not be protected by the discretionary function exception to the FTCA. Justice Scalia noted that the level at which the decision is made is relevant to the inquiry, since the question concerns both the subject matter and the office of the decision-maker [111 S.Ct. 1280]. Justice Scalia gave this example:

> ...One may also imagine a federal officer of relatively low level authorized to hire...by applying ordinary standards of business judgment, and not authorized to consider matters of government policy in the process. That hiring decision would not be protected by the discretionary function exception, even though some element of choice is involved [111 S.Ct. 1281].

Here, low-level federal officer, Maurice Tidwell, was specifically excluded by his employer's founding document from making policy. The government's uncontroverted testimony was that no one had the discretion to compromise the highest standards of safety on KARS facilities. Tidwell himself acknowledged his lack of discretion: "you work for NASA, you

don't have any say so." The day-to-day decisions he made were those that only applied ordinary standards of business judgment and thus were not protected by the discretionary function exception to the FTCA.

In allowing the District Court's fallacious reasoning to stand, the Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceedings, in resolving this important federal question. If this decision is allowed to stand, the government's responsibility to its citizens for the torts of its employees pursuant to the waiver of immunity is substantially eviscerated. The lower courts' decisions stand for the proposition that, when any employee of the government makes any discretionary decision which results in injury to a citizen, that decision is protected by the discretionary function exception.

This position by the District Court, affirmed by the Court of Appeals, also conflicts with the reasoning of this Court's prior holdings in Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed 1427 (1953); United States v. Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed 2d 660 (1984); Berkovitz v. United States, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed 2d 531 (1988). If this reasoning is accepted and applied nationwide, then, the "universally acknowledged" exception to the discretionary function exception noted by Justice Scalia

[111 S.Ct. 1280], automobile negligence, will, as a practical matter be the only instance left where the government is responsible to its citizens for its negligent conduct.

There is nothing in the legislative history of this statute nor in this Court's long and thoughtful consideration of the circumstances governing its application which would support the application of the discretionary function exception to the facts in this case. The lower courts' faulty analysis is based on its ignoring uncontradicted documentary evidence and testimony given on behalf of the United States. These mistakes must be corrected to forestall other misapplications of the discretionary function exception to similar fact settings.

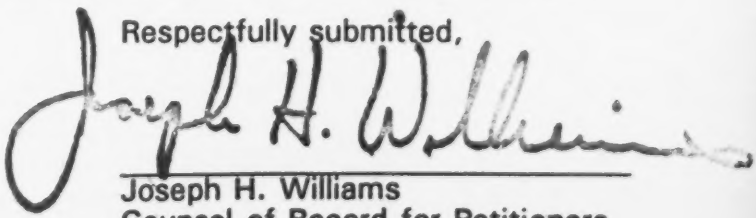
This case provides this Court with an opportunity to place a lower limit beyond which the discretion concerning implementation of the social, economic or political policy of the United States may not reach. Placing that limit would benefit all in the judicial system, courts and litigants, by introducing a standard by which future cases may be measured. This should also act to reduce future petitions to this Court on this subject.

CONCLUSION

The lower courts' actions in ignoring this Court's binding precedent and in coming to a conclusion which conflicts with decisions of other Circuit Courts of Appeals mandates that this Court issue its Writ of Certiorari to the Circuit Court of Appeals for the Eleventh Circuit. This Court must accept this matter for full review to reestablish in the Eleventh Circuit the principle that, when government voluntarily undertakes a non-mandated function, it owes the citizens of this country a duty to use due care in the performance of that function. If that duty is breached, as here, the government must answer to the victims of that breach in damages.

The lower courts' application of the discretionary function exception to the FTCA to make immune the acts of a low-level employee who is not even on the federal payroll, constitutues a serious departure from this Court's previous precedents applying that exception. This Court must issue its Writ of Certiori to the Circuit Court of Appeals for the Eleventh Circuit in order to review this action and establish a lower limit beyond which the exercise of this type of discretion may not reach.

Respectfully submitted,



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APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CONTENTS

Order of United States District Court, Middle District of Florida, Orlando Division, in case number 12-0474-CIV-ORL-18 A-1

Order of United States Court of Appeals for the Eleventh Circuit in case number 93-3317, entered September 20, 1994 A-13

Statutes Involved in this Case

28 U.S.C.A. §1346(b) A-15

28 U.S.C.A. §2671 A-15

28 U.S.C.A. §2674 A-16

28 U.S.C.a. §2680(a) A-17

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BERTHA LEE FOOTMAN & BERESFORD ROBINSON, Individually and as Co-Personal Representatives for the Estate of CHARLENE I. ROBINSON, deceased,

Plaintiffs,

v. Case No. 92-0474-CIV-ORL-18

UNITED STATES OF AMERICA & TAMMY FOOTMAN

Defendants.
_____/

ORDER

Plaintiffs allege that negligent acts of United States employees and Tammy Footman caused the death of Charlene I. Robinson. Plaintiffs bring their action against the United States pursuant to the Federal Tort Claims Act (FTCA), ch. 753, tit. IV, 60 Stat. 842 (1946) (current version in scattered sections of 28 U.S.C.). Plaintiffs filed motions for partial summary judgment on the United States' affirmative defenses that (1) the court lacks subject matter jurisdiction because the alleged negligent conduct falls within the discretionary function exception to the FTCA waiver of sovereign immunity and (2) the United States owed no actionable duty to Charlene I. Robinson. The United States responded in opposition to

plaintiffs' motions. Based on a review of the case file and relevant law, the court finds that the alleged negligent acts of the United States fall within the FTCA discretionary function exception, and thus, sovereign immunity bars plaintiffs' claims against the United States. Accordingly, the court dismisses plaintiffs' claims against the United States for lack of subject matter jurisdiction without reaching the issue of actionable duty. Furthermore, the court exercises its discretion to decline jurisdiction over plaintiffs' pendent state claim against Tammy Footman.

I. FACTS

The National Aeronautics and Space Administration (NASA) created the NASA Exchange - Kennedy Space Center (Exchange) to use and acquire real property and facilities for the benefit of NASA employees at the Kennedy Space Center. The Exchange is a non-appropriated fund instrumentality of the United States. The Exchange established the Kennedy Athletic, Recreation and Social (KARS) organization to promote recreational activities for NASA employees at the Kennedy Space Center. The KARS organization manages a recreational park known as KARS Park No. 1 (KARS Park). The United States, through NASA, owns the KARS Park property.

In 1973, the Exchange hired Mitchell Tidwell (Tidwell) as the park manager for KARS Park. (Tidwell Dep. at 4, 12-13.) The record provides no evidence that the Exchange or the KARS organization promulgated regulations to govern Tidwell's management of KARS Park. (Conway Dep. at 23, 31; Wynn Dep. at 25, 42.) After Tidwell began work at KARS Park, a maintenance worker at KARS Park informed Tidwell that Tidwell's responsibilities included management of the KARS Park swim lake facility. (Tidwell Dep. at 13-14.) Tidwell kept a copy of lifeguard instructions in a file in his office at KARS Park. (Tidwell Dep. at 56.) The KARS organization had drafted the lifeguard instructions in 1970. (Tidwell Dep. at 37, 55.) The lifeguard instructions addressed maintaining the swim lake area, training guards, times for clearing the swim lake, duties of the gate watcher, equipment, and rules and regulations for lifeguards. The instructions required, among other duties, that the lifeguards performed weekly drills and monthly training. (Doc. 26, Exs. E-K.)

In 1970, the swim lake facility was open six days per week and provided swimming and lifesaving lessons. (Tidwell Dep. at 37-38, 58.) Beginning in 1973, the swim lake facility was open only on weekends and did not provide swimming or

lifesaving lessons. (Tidwell Dep. at 38.) Tidwell revised the instructions to reflect that the swim lake facility was open only on weekends and continued to follow some of the instructions. However, in his deposition, Tidwell testified that he questioned whether the instructions were in force in 1990 and noted specific examples of instructions that did not apply to the swim lake facility after the 1973 changes. (Tidwell Dep. at 55-72.) The record provides no evidence that the KARS organization required Tidwell to enforce the 1970 lifeguard instructions. (Wynn Dep. at 25, 42.) The Exchange limited its involvement in the operation of the swim lake facility to specific matters brought to its attention. (Conway Dep. at 22-25.) The KARS organization posted rules for swimmers on the fence surrounding the swim lake facility. (Tidwell Dep. at 54; Doc. 26, Ex. L.)

Although the Exchange paid the lifeguards, Tidwell received no instructions regarding lifeguard qualifications. (Conway Dep. at 23, 31; Wynn Dep. at 16.) In 1990, Tidwell hired lifeguards without lifesaving or CPR certification. (Bradley Craig Dep. at 37.) The 1990 lifeguards did not conduct weekly drills or monthly training. (Tidwell Dep. at 59, 62.)

On June 9, 1990, Charlene I. Robinson, age seven, attended a picnic with her mother and stepfather at KARS Park.

Charlene I. Robinson's stepfather was a member of the local union that sponsored the picnic. The Exchange had granted the union permission to use KARS Park for its picnic and the union paid the Exchange for the use of KARS Park. Five lifeguards were on duty at the swim lake facility when Charlene I. Robinson was swimming. After a man discovered Charlene I. Robinson's body under water, two lifeguards participated in an attempt to resuscitate her while another lifeguard went to Tidwell's office to call for emergency medical service (EMS). (Docs. 37-40, Lifeguard Deps.) Charlene I. Robinson died from drowning.

In their original and amended complaints, plaintiffs allege that the United States is liable for the following negligent acts: (1) failure to hire lifeguards with industry accepted standard certifications; (2) failure to provide lifeguards with in-house and recurrent training to develop lifesaving skills; (3) failure to provide lifeguards with a means to obtain emergency and immediate backup response from EMS; (4) failure to develop a fail safe system to keep unsupervised children from using the swim lake facility; (5) failure of lifeguards to identify the drowning victim and to respond to a potential emergency; (6)

failure of lifeguards to immediately initiate CPR on Charlene I. Robinson and to use industry defined CPR procedures; and (7) failure of NASA to take recommended preventative measures in the face of previous drownings.

II. LEGAL DISCUSSION

A. The United States

The FTCA waives the United States sovereign immunity to liability for damages caused by the negligent or wrongful acts or omissions of its employees while acting within the scope of employment, under circumstances where the United States, if a private person would be liable in accordance with the laws of the place where the act or omission occurred. See 28 U.S.C. §§ 1346(b), 2674. Yet, the FTCA creates a discretionary function exception to the waiver of sovereign immunity, which excludes claims based on government employees' exercise or failure to exercise discretionary functions, whether or not the discretion is abused. See 28 U.S.C. 2680(a). The Eleventh Circuit recently summarized the Supreme Court analysis for the discretionary function exception. See Autery v. United States, 992 F.2d 1523, 1526-27 (11th Cir. 1993) (relying primarily on the Supreme Court decision in United States v. Gaubert, 111 S.Ct. 1267 (1991)). Pursuant to the holding in Autery, the

court must first determine whether the challenged conduct violates a mandatory regulation or policy that allowed no judgment or choice. See id. at 1526 (referring to a specifically prescribed course of action for an employee to follow). Second, if the challenged conduct involves an element of judgment, the court must determine whether the challenged actions are the kind of conduct that the discretionary function exception was designed to shield. See id. at 1526-27 (providing as an example of conduct that is grounded in judgment but not in public policy; a government official who drives an automobile on official business and negligently collides with another car is exercising discretion as to driving but that discretion is not grounded in regulatory policy).

1. Mandatory Regulations.

If a federal regulation requires that an agency take specific steps or allows no room for an official to exercise policy judgment in performing a given act, the alleged failure of an agency to take the mandatory steps or the alleged negligence of the official performing the given act are not within the discretionary function exception. See Berkovitz v. United States, 486 U.S. 531, 544, 546-67 (1988). However, the undisputed evidence in this action shows that no regulations

governed the decisions by NASA, the Exchange, the KARS organization, and Tidwell regarding hiring lifeguards, providing lifeguards with a means to obtain emergency and immediate backup response from EMS, developing a fail safe system to keep unsupervised children from using the swim lake facility, and taking recommended preventative measures in the face of previous drownings. Furthermore, the lifeguards received no specific directives regarding identification of drowning victims, response to potential emergencies, or performance of CPR. As to the 1970 lifeguard instructions, the court acknowledges that the instructions specifically directed the lifeguards to conduct weekly drills and monthly training and that in 1990, the lifeguards did not conduct weekly drills or monthly training. However, the court finds no evidence that the Exchange or KARS organization informed Tidwell that he was required to enforce the 1970 lifeguard instructions. Instead, the evidence shows that the Exchange and KARS organization allowed Tidwell unfettered discretion as to hiring and training lifeguards. Accordingly, the court finds that in 1990, the 1970 instructions were not mandatory regulations. Thus, the court must determine whether the challenged conduct is the kind of conduct that the discretionary function exception was designed

to shield. See Autery, 992 F.2d at 1529 (finding that because the tree inspection plan in effect at the time of the accident did not compel park employees to inspect certain trees on certain days or remove a particular number of trees per week, no mandatory regulation controlled the park employees' actions, and thus, the issue became whether the park employees' choices were grounded in social, economic, or public policy); cf. Phillips v. United States, 956 F.2d 1071, 1075-76 (11th Cir. 1992) (finding that although the Army Corps of Engineers used discretion and made policy judgments in designing and implementing its safety program at a construction site, the discretionary function exception did not apply to a cause of action out of the Army Corps inspectors' actual negligence in discharging the Army Corp's mandatory safety responsibilities).

2. Kind of Conduct.

Evidence that Tidwell and the lifeguards were performing operational functions, as opposed to planning functions, does not take their conduct outside the scope of conduct that the discretionary function exception was designed to shield. See id. at 1527-28 (recognizing that the Supreme Court has expressly rejected the proposition that the discretionary function exception does not reach decisions made at the operational or

management level). Moreover, the Eleventh Circuit has noted that, generally, decisions regarding what safety measures to employ involve balancing policy considerations. See id. at 1527 (referring specifically to safety, aesthetics, environmental impact, and available financial resources). The evidence shows that the park manager's decisions regarding hiring lifeguards, providing lifeguards with in-house training and a means to obtain emergency and immediately backup response from EMS, and developing a fail safe system to keep unsupervised children from using the swim lake facility involved safety factors and resource allocation. Similarly, NASA's decision whether to take recommended preventative measures in the face of previous drownings is the type of planning level decision that entails policy considerations. As to plaintiffs' challenge to the lifeguards' performance of their lifesaving duties, the evidence shows that plaintiffs' claims arise from Tidwell's policy decisions regarding the qualifications and training of the lifeguards, not from the lifeguards' negligence in failing to perform functions that they were qualified to perform. Thus, based on the discretionary nature of the decisions giving rise to the alleged negligent acts, the court dismisses plaintiffs' claim against the United States for lack of subject matter jurisdiction.

See id. at 1531 (finding that to decide on a method of inspecting potentially hazardous trees, and in carrying out the plan, the Park SErvice likely had to determine and weigh the risk of harm from trees in various locations, the need for other safety programs the extent to which the natural state of the forest should be preserved, and the limited financial resources available); see also Gaubert, 111 S.Ct. at 1278-79 (finding that the day-to-day operation of a savings and loan by federal bank regulators involved furthering governmental policy through the exercise of their discretion to choose various courses of action in supervising the savings and loan); United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 820 (1984) (finding that the Federal Aviation Agency spot check system for airplane certification specifically empowered employees to make policy judgments regarding the degree of confidence placed in manufacturers, need to maximize compliance with regulations, and efficient allocation of agency resources).

B. Tammy Footman

Plaintiffs' cause of action against Tammy Footman arises under Florida tort law. Therefore, because the court disposes of plaintiffs' federal cause of action against the United States

before trial, the court declines to exercise jurisdiction over plaintiffs' pendent state claim against Tammy Footman. See Rice v. Branigar Org., Inc., 992 F.2d 788, 792 (11th Cir. 1991) (holding that if a court dismisses federal claims before trial, the court has discretion to dismiss pendent state claims).

III. CONCLUSION

Because the record shows that the United States' allegedly negligent acts fall within the discretionary function exception to the FTCA waiver of sovereign immunity, the court **DISMISSES** plaintiffs' claims against the United States for lack of subject matter jurisdiction. See Fed. R. Civ. P. 12(h)(3). Accordingly, plaintiffs' motions for partial summary judgment on the United States discretionary function and actionable duty defenses are **MOOT.** (Docs. 26, 30.) Furthermore, the court declines to exercise jurisdiction over plaintiffs' pendent state claim against Tammy Footman, and thus, **DISMISSES** plaintiffs' action against Tammy Footman without prejudice.

It is **SO ORDERED** in Orlando, Florida, this 28th day of September, 1993.

/s/
G. KENDALL SHARP
United States District Judge

Copies to all counsel of record

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-3317

D.C. Docket No. 92-474-Civ-ORL-18

BERTHA LEE FOOTMAN, individually and as Co-Personal Representative of the Estate of CHARLENE I. ROBINSON, deceased, BERESFORD ROBINSON, individually and as Co-Personal Representative of the Estate of CHARLENE I. ROBINSON, deceased,

Plaintiffs-Appellants,

versus

NATIONAL AERONAUTICS & SPACE ADMINISTRATION,

Defendant,

TAMMY FOOTMAN,

Defendant-Appellant,

UNITED STATES OF AMERICA

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(September 20, 1994)

Before TJOFLAT, Chief Judge, ANDERSON, Circuit Judge, and PAINE*, Senior District Judge.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.

"Costs taxed against plaintiffs-appellants."

*Honorable James C. Paine, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Judgment Entered: September 20, 1994
For the Court : Miguel J. Cortez, Clerk

By: /s/
Karleen McNobb, Deputy Clerk

ISSUED AS MANDATE: October 11, 1994

STATUTES INVOLVED IN THIS CASE

28 U.S.C.A. §1346(b). United States as Defendant:

Subject to the provisions of chapter 171 of this chapter the district courts together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States for money damages accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C.A. §2671. Definitions:

As used in this chapter and sections 1346(b) and 2401(b) of this title the term "Federal Agency" includes the executive departments, the judicial and legislative branches, the military department, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504 or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32 means acting in the line of duty.

28 U.S.C.A. §2674. Liability of United States:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide for damages only

punitive in nature, the United States shall be liable to actual or compensatory damages measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claims to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

28 U.S.C.A. §2680(a). Exceptions:

The provisions of this chapter in section 1346(b) of this title shall not apply to -

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved is abused.